UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

DATATREASURY CORPORATION,	)	
	)	Civil Action No. 2:06-CV-72
Plaintiff,	)	
v.	)	
WELLS FARGO & COMPANY, et al.,	)	
Defendants.	)	

DEFENDANT UNIONBANCAL CORPORATION'S SURREPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(2)

Defendant UnionBanCal Corporation ("UnionBanCal") submits this sur-reply in support of its opposition to DataTreasury Corporation's ("DataTreasury") Motion to Compel Certain Documents Relating to Defendant UnionBanCal Corporation's Jurisdictional Challenge (D.E. No. 523) ("Motion to Compel") to correct DataTreasury's mischaracterization of the governing law that applies both to Defendant UnionBanCal Corporation's Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(2) and Brief in Support Thereof (D.E. No. 83) ("Motion to Dismiss") and to DataTreasury's Motion to Compel.

In Defendant UnionBanCal Corporation's Reply to Plaintiff's Response to Defendant's Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(2) (D.E. No. 247) and in UnionBanCal Corporation's Opposition to Plaintiff's Motion to Compel Production of Certain Documents (D.E. No. 575), UnionBanCal pointed out that Federal Circuit law, not Fifth Circuit law, applied to the determination of personal jurisdiction and the relevance of certain evidence to that determination. Thus, DataTreasury's citation to *Gundle Lining Constr. Corp. v. Adams*

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County Asphalt, Inc., 85 F.3d 201 (5th Cir. 1996), was inappropriate and could not be relied upon by this Court in deciding the motions at issue. Despite the clear case law on this issue, in its Reply to UnionBanCal Corporation's Opposition to Plaintiff's Motion to Compel Production of Certain Documents (D.E. No. 581) ("Pl.'s Reply"), DataTreasury persists in its reliance on *Gundle* and misconstrues the clear law to the contrary through an entirely circular argument.

When it argues that the *Gundle* factors are nevertheless applicable, DataTreasury admits, as it must, that in patent infringement suits "the law of the United States Court of Appeals for the Federal Circuit and not the Fifth Circuit binds this court, even as to matters concerning personal jurisdiction." (Pl.'s Reply at 1 (quoting *DataTreasury Corp. v. Small Value Payments Co.*, 2:04-cv-85 (E.D. Tex.) (Order of Nov. 16, 2004) (hereinafter "*DTC Order*") (citing *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1564-65 (Fed. Cir. 1994))).) Next, DataTreasury, in its parenthetical citation of *Beverly Hills Fan Co.*, notes that "although issues of personal jurisdiction are generally procedural in nature, they are sufficiently related to substantive patent law, and thus the law of the Federal Circuit controls." (Pl.'s Reply at 2.) DataTreasury then states that the "Federal Circuit, however, defers to the law of the regional circuits to resolve non-substantive issues." (*Id.* (quoting *DTC Order*).) DataTreasury then incredibly concludes that "with regards to the issue of personal jurisdiction, this Court looks to the law of the regional circuit for guidance." (*Id.*) This penultimate sentence is directly contradicted by all of the case law cited by DataTreasury in the preceding sentences. DataTreasury's position on the law is simply wrong.

DataTreasury's totally circular argument and misapplication of case law in its filings fail to present any factual or legal basis to support its theory that under *Gundle* it is entitled to broader jurisdictional discovery than that provided under this Court's prior order.[1] Instead, under the controlling Federal Circuit case law, it is clear that DataTreasury has failed to establish the relevance of the information sought in its Motion to Compel and has failed to establish that this Court has jurisdiction over UnionBanCal.

Respectfully submitted,

March 7, 2007

/s/ Scott J. Pivnick

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[1] UnionBanCal notes as well that even under the *Gundle* factors, DataTreasury has not made a predicate showing that any of the expansive discovery it demands would be sufficient to establish personal jurisdiction.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 7, 2007 a true and correct copy of the above and foregoing document has been served on all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Gerri Carrenard